California PEER
Public Employees for Environmental Responsibility
P.O. Box 2368 • Sacramento, CA 95812-2368
phone: (530) 333-2545
e-mail: capeer@peer.org

July 23, 2001

In the Matter of:

RULEMAKING TO MODIFY
RULES OF PRACTICE AND
PROCEDURE FOR POWERPLANT
APPLICATIONS

California Energy Commission

Docket Number: 01-SIT-1

COMMENTS ON INITIAL DRAFT MODIFICATIONS TO SITING REGULATIONS

Public Employees for Environmental Responsibility (PEER) makes the following comments regarding the proposed Initial Draft Modifications to Siting Regulations, dated June 26, 2001.

General Comments:

PEER supports public employees in their efforts to protect the environment, including public disclosure of government actions that are contrary to environmental protection or to objective evaluation of environmental impacts and mitigation measures.

PEER is concerned about the California Energy Commission's (CEC) initial draft modifications to the power plant siting regulations for several reasons. First, a number of the proposed changes to the regulations would restrict the rights of the public to participate in siting cases. Such participation is crucial not only to fulfill the mandate of the enabling legislation of the CEC to have an open, public

Headquarters: 2001 S Street, NW • Suite 570 • Washington, D.C. 20009 • 202-265-PEER (7337) • fax: 202-265-4192
e-mail: info@peer.org • website: http://www.peer.org

process, but also to provide citizens the opportunity to express their concerns and provide information to the Commission, its staff, public agencies, the applicant, and others regarding environmental topics relevant to power plant siting projects.

The opportunity for public scrutiny of the CEC's actions should be increased rather than restricted. In the Metcalf case the CEC staff's management and legal counsel refused to provide relevant information regarding staff's actions that was requested by the press and an intervenor under the Public Records Act, without offering any evidence to support the alleged grounds for the refusal. This demonstrates the need for more openness in the process.

A number of the proposed changes to the siting regulations would limit public noticing requirements. Several reasons have been given for limiting noticing requirements, including that the public should be able to trust the CEC "staff." Previous experience, most recently regarding Calpine/Bechtel's Metcalf project mentioned above, shows that the CEC staff does not always present objective analysis of power plant issues. Although it appears that the technical staff typically does objective work, the partial information provided in response to Public Records Act requests reveals that management and staff counsel have shown that they have an agenda to approve power plants at almost any cost to the environment and the local community. This apparently is a reflection of the political pressure that exists due to developers' actions and the general pressure from elected state politicians due to the electrical energy situation in California.[1] In the Metcalf case a number of internal staff documents (which have been docketed) show the one-sided pressure that management and legal counsel put on staff to change their testimony to make the project appear more favorable. PEER is undertaking an investigation of the CEC to discover the full extent of political influence on CEC staff and to work to end such influence. Another reason given for restricting public noticing is that "the public gets tired of all the meetings." However, members of the public who get tired of

[1] In the Metcalf case the Governor and various individuals and groups in the state Legislature urged the CEC to approve that project even though the law requires that siting decisions be made on the basis of the evidentiary record only.

meetings are not obliged to attend them, and members of the public who want to attend meetings should be allowed to and should be informed of them. Yet another reason given is that "too many notices confuse the public." Notices inform the public, and should be written clearly to minimize confusion, and any potential confusion by some members of the public is outweighed by the right of all of the public to be informed of meetings and to attend them. Lastly, it has been said that "the current process frustrates people," but the public's frustration would increase if their ability to participate in the siting process were restricted.

Another concern is that some of the changes to the regulations would restrict the rights of the public to participate in hearings on siting cases. The changes would make the right of each party to present the testimony of witnesses, to cross-examine opposing witnesses, and to rebut evidence subject to the discretion of the presiding member. These rights are essential to adequate public participation in the siting process and no one should have the authority to prevent members of the public from exercising these rights. The CEC needs the authority to structure hearings, but should not eliminate or unduly restrict any of the rights of the public to participate in them.

Specific Comments:

Section 1, Section 1212 (b):

The proposed new language that

> "The presiding member may restrict the use of oral testimony and cross-examination when written testimony indicates that there are no genuine disputes of material facts and when the presiding member determines that oral testimony or cross-examination would not materially assist the commission in reaching an informed decision"

should not be added to the regulations. Each party should have the right to decide whether or not it will present oral testimony and cross-examination. In oral testimony parties often place particular emphasis on certain parts of their written testimony, to ensure that decisionmakers take heed of their importance. In cross-examination it is not

possible for the presiding member to predict the nature or specific questions of a party, so the presiding member cannot know in advance whether witnesses' responses to cross-examination would add meaningfully to the evidentiary record.

Section 1, Section 1212(c):

The proposed wording "Subject to the presiding member's exercise of discretion in the conduct of an efficient hearing process" should not be added to the regulations. Our nation's founders realized and accepted that democracy is an inherently inefficient form of government, but that the participation of the citizenry in the government is more important than efficiency. The public's rights to present witnesses, cross-examine opposing witnesses, and rebut evidence should not be at the discretion of the presiding member.

Section 2, Section 1710(h):

The proposed new wording that would allow any parties to meet to discuss any matter related to the project without a publicly noticed workshop is too broad. Meetings between the CEC staff and the applicant are of concern, particularly those that address substantive issues. Safeguards to ensure the appearance and reality of the objectivity of the CEC staff should be enhanced, not reduced. Although wording is proposed to require staff to docket and serve a written record of meetings with the applicant, the public should have the right to attend such meetings to hear the actual discussions and to ensure that any written record is complete and accurate.

Section 1712(b):

Because of the reasons given above regarding why specified changes to Section 1212(b) and Section 1212(c) should not be made, the reference to Section 1212 should not be added to Section 1717(b).

Section 4, Section 1714.5 (d):

None of proposed subsection (d) should be added to the regulations. Comments received by the Commission from any state agency "that make recommendations within the area of expertise of that agency" should not be "deemed to

represent the position of the State of California on the subject matter commented upon." First, the mandate of another state agency may not be sufficiently broad to adequately consider all of the aspects of an issue that the agency comments upon. For instance, the CEC is required to comply with the California Environmental Quality Act, and such compliance may require consideration of aspects of an issue that are outside of the comments of another agency. In addition, the CEC staff has substantial expertise on many environmental and engineering topics, and the Commission should consider the staff's position as well as the positions of other agencies in determining the State's position on the subject matter commented upon.
Section 1751 (a)

The proposed change as worded would make the evidentiary record a subset of the hearing record, but the hearing record is actually a subset of the evidentiary record. Therefore, the subsection should be worded as follows:

"The presiding member's proposed decision shall be based exclusively on the evidentiary record of the proceedings on the application, including the hearing record."

Thank you for the opportunity to comment.

Respectfully submitted,

Karen Schambach

Karen Schambach
California Coordinator